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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

## No. 312

MOUNT VERNON FIRE INSURANCE COMPANY,
an insurance company,
*Petitioner,*

*vs.*

HIGHWAY TRAILER COMPANY, a corporation,
*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## Counter-Statement of Facts

From first to last this was an ordinary civil suit on a policy of theft insurance. It involved nothing, even by suggestion, that has the aspect of a federal question.

In Petitioner's "Statement of Facts" (p. 3) the facts that are given are decidedly in a minor relation to those that are not given. If there is any fault in the New Jersey Supreme Court decision it is not where Petitioner says it is but rather in the Court's failure to give effect to elements in the case favorable to appellant, and at least as compelling if not more so, than that which in the Court's opinion finally determined the result in this Respondent's favor. In making this statement our reference is to things in the record that are not disputed, as follows:

Continuously for three years following the report of the theft Petitioner's spokesman professed to be "suspicious" of the claim, and just as continually for three years—down to the time of trial—declared himself busy with "investigation", (Record 152a, 35-40). This induced the Petitioner-insurer not to reject the claim and not to deny it, but rather, in the words of its spokesman, to "stand pat", (Record 122a, 20; 123a, 28-30). The ultimate meaning of this performance by the company was of course that it would not pay the claim which could in reason and under the cases be viewed only as rejection.

Also undisputed was the fact that Petitioner-insurer had demanded of Donna Motor Company, the primary insured, proof of the loss in terms definitely more exacting than anything required by the policy itself. (Record 150a, 30 to 40; 173a, 1 to 15. See p. 3 of policy, supplement to record.)

In addition, there were cited to the New Jersey Supreme Court numerous New Jersey cases to show that Petitioner-insurer's conduct throughout had worked a waiver of proof of loss. (Cases, Appendix I hereto). Indeed, the Appellate

Division held that such waiver *had actually occurred*, notwithstanding which its opinion implies the assumption of an *unwaiving of the waiver* without its stating how such a phenomenon had or could have ensued. (Appellate Division Opinion, appendix 2 hereto; see 3rd par.)

Also, the Petitioner's "suspicion" respecting theft of the trailer was for every purpose of the case finally resolved by the trial Court's finding that the theft from the beginning was genuine and the claim valid, which finding the Petition admits, and concerning which no question was raised in either appellate court. The finding was basic and removed from the case retroactively the only excuse Petitioner ever gave for not paying the claim.

In addition to waiver by Petitioner's own conduct of its right to formal loss proof, there is the concrete fact of its request for such proof several months after the lapse of the 60-day period and after insured's business had been ruined by the delay (Record 49a, 15 to 30; 168a, 26).

Petitioner sought to absolve itself from all obligation to Respondent by ascribing to it a non-privity status in the transaction. This resort was completely obstructed by three things. One, virtually the only real interest in the subject of the insurance was that of Respondent in its conditional sale agreement, only one payment out of the numerous payments required having been made. Two, Respondent's insurable interest, recognized and established by the New Jersey Sales Act, N.J.S.A. 12a:2-501, as follows:

> "(2) The seller retains an insurable interest in goods so long as title to or any secured interest in the goods remains in him."

Three, Respondent's resulting authority in the situation, recognized and sought for exploitation by Petitioner in its

going to Respondent, entirely apart from any matter of loss proof by Donna, as the New Jersey Supreme Court observed, and negotiating with Respondent for settlement of the insurance claim by Respondent's acceptance of another and cheaper trailer of Petitioner's choosing.

Nor is it to be forgotten that the very language designating Respondent as loss payee in the policy called for payment by Petitioner to Respondent "as its (Respondent's) interest may appear."

## *ARGUMENT*

## POINT I

**The petition for certiorari shows no semblance of ground for the granting of the writ.**

Jurisdiction is said at p. 2 to be invoked under 28 U.S.C. 1257 (3). This case concerns nothing within the cited code section, viz:

(a) The validity of a treaty or statute of the United States.

(b) The validity of a statute claimed to be repugnant to the Constitution, treaty or laws of the United States.

(c) Any right, title, privilege or immunity set up or claimed under the Constitution, treaty or statutes of, or commission held or exercised under, the United States.

The distinct feature of this Petition is its incredible naivete. We read in the Petition that the "Constitutional provision involved" (p. 3) is Article I, Sec. 10, Clause I, of the Federal Constitution and the 14th Amendment thereof. The designated Section and Clause of Article I pro-

vides what "No *State* shall" do; and the particular final clause of the 14th Amendment, which Petitioner would mold to its purpose, begins: "Nor shall any *State* * * *". Not even remotely are we concerned here with a State or a statute.

It is no extravagance to say that if this case as decided by the New Jersey Supreme Court really involves anything within the foregoing Code section or Constitutional provisions, it must follow inevitably that every decision by every final Court of every State in the Union is reviewable by the United States Supreme Court. It would just about mean that the loser in the State court must be regarded as having been *deprived* and *denied* by the *State* within the meaning of the latter provision of the 14th Amendment and is thus endowed with right of appeal to the highest court in the land for further adjudication, an unthinkable proposition.

## POINT II

**The statement on page 6 of "how the federal question arose" demonstrates that no federal question ever arose.**

Presumably this statement is offered as a compliance with Rule 23(f) of this Court, the pertinent portion of which reads:

> (f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; * * *.

In the light of this rule we witness another test showing the gross inadequacy of this Petition. The assertion that (Petition, p. 6) "The Federal question arose when the Supreme Court of New Jersey reversed the decision of two courts below and applied a questionable principle of law * * *", given as a compliance with Rule 23(f) and being at the same time completely oblivious of the specific requirements of the Rule, is purely and simply the statement of an arrogated claim of right to appeal from the State Court to this Court. It can be nothing else. And the citing of cases from various states, as the Petition cites them, carries the suggestion that it is for this Court, in light of the instant disposition by the New Jersey Court, to achieve a plenary reconciliation of conflicting authorities.

From page 6, bottom, Petitioner quotes at length passages from insurance text books, all necessarily in the abstract and having not the least relation to our problem. From pages 10 and 14 the Petition is belabored with quotations from New Jersey cases and others that are completely pointless or which were or should have been included in the New Jersey argument. It is a fair observation that certiorari in this case could result in no more than Petitioner's leave to make in the United States Supreme Court the re-argument which the New Jersey Court denied in its rejection of petition for rehearing.

## POINT III

**The contention that an obligation of a contract was impaired is a manifest fallacy.**

At page 16 the proposition is advanced that the New Jersey Supreme Court "impaired the obligations of a contract in violation of the United States Constitution". Obviously there was no impairment of a contract in any sense.

What the New Jersey court found was that Mount Vernon Fire Insurance Company, this Petitioner, had in effect waived compliance with a specific term of the contract, i.e., with the proof of loss provision, or in other words, using the court's formula, had *equitably estopped itself* from "asserting against Highway any right which might have otherwise arisen from Donna's failure to file proof of loss" (p. 7a). Mount Vernon's (Petitioner's) conduct toward Highway which worked to the latter's prejudice and resulted in the estoppel is fully delineated in the Supreme Court opinion (p. 6a). That opinion, so far from impairing any obligation of the insurance contract, postulated the effective subsistence of the contract, else none of its provisions could have been waived or affected by estoppel. It is one thing for a contractual obligation to be *impaired* and quite another for a contracting party to *forfeit* his right to enforce the obligation.

## POINT IV

**This case qualifies in no particular for the granting of certiorari.**

Rule 19 of this Court reads in its opening paragraph as follows:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: • • •"

Nor does the Petition in any way relate to sub-sections (a) and (b) of the same Rule.

"Certiorari should not be granted except in cases involving principles the settlement of which is of importance to public, as distinguished from that of parties, and in cases where there is a real and embarrassing conflict of opinion and authority between Courts of Appeal. Rice v. Sioux City Memorial Parks Cemetery, U. S. Iowa 1955, 75 S. Ct. 614, 349 U. S. 70, 99 L. Ed. 897."

"Special and important reasons", within this rule relating to granting of certioari, relate to problems beyond the academic or episodic, especially where issues involved reach constitutional dimensions. Rice v. Sioux City Memorial Park Cemetery, ibid."

## POINT V

**Petitioner tries to show that the inhibitions upon the states imposed by Art. I, Sec. 10, Clause I and by 14th Amendment of the Constitution, are directed also to the state courts. There is no authority for this.**

At page 16 Petitioner undertakes to expand the meaning of Article X, Sec. 1 relating to no State's impairing the obligation of a contract, so as to have it include the effects of judicial decisions as well as statutes. Nothing cited supports the proposition. In *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444 (1923) the Chief Justice states at p. 451:

"It has been settled by a long line of decisions that the provisions of Sec. 10, Art. 1, of the Federal Constitution protecting the obligations of contracts against State action is directed only against impairment by legislatures and not by judgments of courts. The language 'no State shall pass any law impairing the obligation of contracts' plainly requires such a

decision. However, the fact that it has been necessary for this Court to decide the question so many times is evidence of persistent error in regard to it."

In *McCulloch* v. *Virginia*, 172 U. S. 102 (1898) cited by Petitioner this Court dealt with a *statute* of Virginia. In *Butz* v. *City of Muscatine*, 75 U. S. 575 (1869) also cited, the court dealt with a *statute* of Iowa.

Nothing in all the cases and authorities cited aids the Petitioner's point. The principle to be taken from all of them, where the question involves a State court decision construing a statute so as to give it unconstitutional effect—which is not in this case at all—is that it is the *statute* that becomes the subject matter of the review and not the State court decision, this Court, needless to say, being completely unbound in its dealing with the statute by anything the State Court had decided.

## CONCLUSION

**For the foregoing reasons the Petition for Certiorari should be denied.**

Respectfully submitted,

KORS AND RUBIN,
*Attorneys for Respondent.*

CHARLES N. KORS,
*On the Brief.*

# APPENDIX 1

## Cases Cited to State Court

Chesanski v. Merchants, 102 N. J. L. 414; 131 At. 910

Evans v. Farmers R. Ins. Co., 110 N. J. L. 159; 164 At. 258

Jones v. Mechanics Fire Ins. Co., 36 N. J. L. 29; 13 Am. Rep. 405

Guarraia v. Met. Life Ins. Co., 90 N. J. L. 682; 101 At. 298

Radwanski v. Scottish, etc., 100 N. J. L. 192; 126 At. 657

Rommage v. Merchants Fire Ins. Co., 13 N. J. L. 110

Rosenberg v. Maryland Cas. Co., 3 N. J. Misc. 1132; 102 N. J. L. 724; 132 At. 923

State Ins. Co. v. Maackens, 38 N. J. 564

# APPENDIX 2

## Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—July 7, 1965)

Argued May 17, 1965—Decided July 7, 1965.

Before Judges Gaulkin, Foley and Collester.

*Mr. Louis Greenberg* argued the cause for the plaintiff (*Messrs. Kors and Rubin,* attorneys).

*Mr. Edward G. D'Alessandro* argued the cause for the defendants (*Messrs. Friedman & D'Alessandro,* attorneys).

PER CURIAM.

Plaintiff Highway Trailer Company (Highway) sued Donna Motor Lines, Inc. (Donna) for the balance due for a trailer sold to Donna by Highway upon a conditional sales contract. In a separate count, Highway sued Mount Vernon Fire Insurance Company (Mount Vernon) upon its policy covering the theft of the trailer. Judgment was entered by default in favor of Highway against Donna. After trial without a jury, judgment was entered in favor of Mount Vernon against Highway and Highway appeals.

The trial judge held that Mount Vernon was not liable to Highway because Donna had not filed a proof of loss as required by the policy.

Highway contends that filing of a proof of loss was waived altogether by Mount Vernon. The trial court found as a fact that there had not been such waiver, and, since

there was substantial evidence to support that finding, we accept it. *State* v. *Johnson*, 42 N. J. 146 (1964). However, we make the additional finding that filing "within 60 days after the occurrence of loss," as required by the policy, was waived.

The loss happened December 10, 1960. On May 2, 1961 Frank S. Walsh, the authorized agent of Mount Vernon, told John Wygant, Donna's attorney, that a proof of loss would be necessary before payment could be considered, and sent him the following letter:

> "Enclosed herewith you will find a Proof of Loss which we would thank you to have properly executed by an officer of Donna Motor Lines, and properly notarized, and return it to this office at your earliest convenience so that we may properly process this claim with the company.
>
> Thanking you for your attention to this matter, we are
>
> Yours very truly,
>
> Frank S. Walsh, Inc."

The trial judge held that there was not sufficient evidence to establish the attorney's agency to speak to Walsh about the claim or to receive the letter on behalf of Donna. We disagree. Lawrence Charron, president of Donna, testified that Wygant (who died before the trial) was Donna's attorney, and although he did not recall the conversations which he had "back and forth over the telephone" with the attorney or whether he retained him "to sue for the recovery of the value of this trailer," that " anything that pertained to this, he [the attorney] used to take care of it himself."

*Appendix 2*

Donna never filed a proof of loss. Mount Vernon took no further steps after May 2, 1961 upon which waiver could be predicated, and in June 1961 this action was commenced. The policy provides:

> "When loss occurs, the insured shall:
>
> * * *
>
> (c) file proof of loss with the company within sixty days after the occurrence of loss, unless such time is extended in writing by the company, in the form of a sworn statement of the insured setting forth the interest of the insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, * * * and the description and amounts of all other insurance covering such property.
>
> * * *
>
> Payment for Loss; Action Against Company: Payment for loss may not be required nor shall action lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy nor until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy."

In addition, the policy contained the usual provisions for examination of the insured "under oath," appraisal in the event of disagreement as to the amount of loss, and other provisions relating to the evaluation and satisfaction of the loss which could hinge on the figures advanced by insured in a proof of loss.

*Appendix 2*

We are told that, while this action was pending, Highway filed what purported to be a proof of loss. We have not seen it, but a proof by Highway would not satisfy the above quoted provisions. Mount Vernon was entitled to a proof supported by the oath of the insured. *Cf. Reed* v. *Firemen's Insurance Co.*, 81 N. J. L. 523, 531 (E. & A. 1911).

It is well settled that a payee under a loss payable clause (as distinguished from a standard mortgagee clause) may not recover if the insured has breached any provision of the policy which would prevent a recovery by him. Here Donna could not recover and therefore Highway may not. *Dikowsky* v. *Metropolitan Life Ins. Co.*, 128 N. J. L. 124 (E. & A. 1941); *Hanson* v. *National Liberty Fire Ins. Co. of America*, 100 N. J. L. 215 (Sup. Ct. 1924); *Brindley* v. *Firemen's Ins. Co. of Newark*, 35 N. J. Super. 1 (App. Div. 1955); 5 Appleman, *Insurance*, §3335 (1941); 5 Couch, *Insurance*, §1215a, p. 4426 (1929).

The judgment is affirmed.